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No. 96-1332

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

NORFOLK SOUTHERN RAILWAY COMPANY
and DANNY STEVE GARNER,
Petitioners,

v.

BRUCE LANG, PEGGY LANG and DOUGLAS K. HAMLIN,
conservator of the estate of Cinda S. Karjala,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Alabama

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PETITIONERS' REPLY BRIEF

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PETITIONERS' REPLY BRIEF

Norfolk Southern Railway Company's petition for certiorari demonstrated that the Alabama Supreme Court's decision narrowly construing this Court's decision in *CSX Transp., Inc.* v. *Easterwood*, 507 U.S. 658 (1993), was both inconsistent with the plain language of this Court's decision and with at least three federal circuit court opinions. Respondents argue in opposition that *Easterwood* should be given an extraordinarily crabbed interpretation based on general pre-emption principles and that the opinions of the courts of appeals reading *Easterwood* more expansively can be distinguished. Neither argument withstands scrutiny. At the end of the day, there is a real conflict between the federal circuits and the Alabama Supreme Court that warrants this Court's review and this case presents an excellent vehicle for developing further the con-

tours of the Court's decision in *Easterwood* and thereby providing needed guidance to the lower courts on issues that recur frequently.

1. Respondents begin their response with an extended discussion of familiar principles of pre-emption law, *viz.*, pre-emption is disfavored and there is a presumption against pre-empting state law (Opp. 7-9). But this analysis is completely irrelevant to the question whether respondents' specific claims are pre-empted under this Court's interpretation of 45 U.S.C. § 434 in *Easterwood*.

Those principles already informed the Court's decision in 1993 not to adopt broader pre-emption theories. They provide no basis for cutting back on the Court's express holding that federal funding is the touchstone of pre-emption because under the Secretary of Transportation's regulations, funding necessarily embodies federal approval of the particular devices installed at a particular crossing. *Easterwood*, 507 U.S. at 671 ("for projects in which federal funds participate in the installation of warning devices, the Secretary has determined the devices to be installed"). The approval and expenditure of federal funds for the particular project thus constitutes a "standard covering the subject matter of such State requirement . . ." that pre-empts state law. 45 U.S.C. § 434; *Easterwood*, 507 U.S. at 664.

With respect to the precise limits of pre-emption, the Court answered that question in *Easterwood* as well—any state law, including tort law, which "seeks to impose an independent duty on a railroad to identify and/or repair dangerous crossings" is pre-empted. 507 U.S. at 671. Thus, contrary to respondents' hyperbole (Opp. 12), petitioner does not seek complete immunity for tort actions arising out of crossing accidents.[1] Instead, it seeks merely

[1] Section 434 and 23 C.F.R. § 646.214(b)(4) operate in tandem to preempt all state law claims seeking recovery in connection with the adequacy of the signals that the federal government has approved and funded. Thus, if a railroad breaches a different duty,

what the statute provides in light of *Easterwood*, elimination of a state tort duty to identify or repair dangerous crossings.

This is precisely the duty the Alabama Supreme Court imposed upon petitioner. The railroad now must identify "unduly hazardous" crossings (Opp. 6) and assume a duty to "warn" motor vehicle traffic about those hazards and it must identify crossings with poorly maintained safety devices and "repair" them. The decision below thus reduced this Court's treatment of the duty to "identify and/or repair" into a mere pleading requirement, permitting plaintiffs to assert that state tort law duties to "warn" and "maintain" are not pre-empted. This reading is certainly at odds with the language of the Court's opinion and the Court should grant the petition to clarify its prior holding.

2. Given the clarity of the Court's holdings that federal funding triggers pre-emption and that the duty to "identify and/or repair" is pre-empted, the courts of appeals have uniformly and routinely found pre-emption whenever there is uncontested proof, as there is here, that federal funds were employed in installing safety devices at a crossing. See, *e.g.*, *Armijo* v. *Atchison, T. & S. Fe Ry.*, 87 F.3d 1188 (10th Cir. 1996); *Elrod* v. *Burlington N.R.R.*, 68 F.3d 241 (8th Cir. 1995); *Hester* v. *CSX Transp., Inc.*, 61 F.3d 382 (5th Cir. 1995), *cert. denied*, 116 S. Ct. 815 (1996). Respondents' attempts to distinguish these cases are completely unavailing.

With respect to *Armijo*, respondents simply assert (Opp. 16) that it was wrongly decided because it ignored "the presumption against pre-emption." Even if the suggestion had merit, which it does not because the holding is completely faithful to *Easterwood*, the argument reveals plainly that there is a square conflict between the holding

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such as a failure to sound a horn or to maintain a proper lookout, which causes an accident at a grade crossing, then there is no pre-emption. There are myriad similar duties that are unaffected by petitioner's preemption argument. *See* Opp. 16-17 (identifying non-preempted claims in the case law).

in *Armijo* that a state law claim of "failure to warn" of hazardous conditions is pre-empted because of federal funding (87 F.3d at 1189) and the holding below that precisely that same state law duty is not pre-empted. This conflict is more than enough to justify certiorari.

Respondents attempt to distinguish the other cases on the basis that this case involves a failure properly to apply 23 C.F.R. § 646.214(b)(3), which establishes criteria for installing active warning signals, as opposed to the passive signals funded in this case. Of course, there is not one word in the supreme court's opinion below that remotely embraces this argument. Moreover, there is no basis for concluding that the Secretary of Transportation erred in deciding that these crossings did not require automatic gates when he approved funding for installing passive safety warnings.

Incredibly, respondents take the argument even further and attempt to convert the clear legal holding below into a failure of proof case by suggesting that petitioner "failed to prove that any diagnostic team had made [a § 646.214 (b)(3)(i)] determination for either of the crossings involved in the present cases." Opp. 14. Even this contrivance does not distinguish the federal circuit cases. In *Hester* the court of appeals explicitly noted that "there is no record evidence indicating that such a diagnostic team made any recommendations with respect to Hatley Circle." 61 F.3d at 386 n.6. That failure of proof was not fatal in *Hester* because, as in this case, there was "an actual, authorized expenditure of federal funds . . . to trigger pre-emption." *Id.*[2] Thus, the precise argument now offered

[2] Although the court in *Elrod* did off-handedly note that none of the conditions that would trigger use of automatic gates was "present at that particular crossing," 68 F.3d at 243 n.5, the opinion in no way indicated that this fact was at all relevant to the pre-emption analysis. Instead, the court focused exclusively on " '[t]he fact that federal funds participated,' " which " '*legally* presupposes that the Secretary determined that the safety devices installed

by respondents was specifically identified as irrelevant in *Hester*. The conflict between the decision below and *Hester* simply cannot be made to disappear with this sleight of hand.

Finally, respondents point out that "in all three cases relied upon by the petitioner, the courts expressly noted that there were negligence claims against the rail carriers that were not pre-empted. . . ." Opp. 16. This observation is true, but how respondents regard it as relevant is baffling. First, this argument completely undermines respondents' assertion (Opp. 12-13) that fidelity to *Easterwood*, as these courts have interpreted it, will "immunize" railroads from all claims arising out of grade crossing collisions. See note 1, *supra*.

Second, the additional observation that "respondents *raised* claims . . . unrelated to any claim of inadequate warning signs" does nothing to help them in this Court. Opp. 17 (emphasis added). The operative language is "raised," in the past tense. Only the Langs ever raised any question concerning vegetation control in the trial court and they expressly abandoned all non-signal-related claims at the hearing on summary judgment. See Pet. App. 34a ("stipulation of the plaintiffs" to dismiss all claims "save and except the sole claim with respect to the adequacy of the signs" "with prejudice"). In light of this stipulation, respondents, not surprisingly, did not present any question on appeal to the Alabama Supreme Court concerning pre-emption of negligence with respect to any non-signal-related claims.[3] Thus, the absence of non-pre-empted tort claims is strictly a function of respondents' litigating

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were adequate to the task.' " *Id.* at 244 (emphasis added), quoting *Hester*, 61 F.3d at 387. That same "legal presupposition" applies here and accordingly preemption should follow as well.

[3] *See* Brief of Appellants, *Lang* v. *Norfolk Southern Railway Company*, Case No. 1931292 (filed Sept. 19, 1994) at 10 (questions presented limited to "the adequacy of the warning devices at the Pace Street Crossing").

strategy and in no way diminishes the worthiness of this case for certiorari. Indeed, the case is a particularly good vehicle for resolving the question presented because it presents a single, clean issue for resolution that promises to end this litigation once and for all.

* * * *

This case warrants review for precisely the same reasons that review was appropriate in *Easterwood*. In both cases the appellate court reopened litigation by taking a restrictive view of the pre-emptive effect of 45 U.S.C. § 434, and in so doing adopted an interpretation that conflicted with decisions of other courts of appeals. As both the petition (at 14 n.10) and the *amicus* brief for the Association of American Railroads (at 7) amply demonstrate, these are issues that recur just as frequently today as they did in 1993. If anything, the frequency of appellate decisions on the issue has increased in the wake of *Easterwood*. Pet. 14. Respondents do not even attempt to argue that the question posed by petitioner is not a recurring or a fundamental issue under the Federal Railway Safety Act. Nor could they.

CONCLUSION

For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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